IZZAP LTD

v.

SANMARU OVERSEAS MARKETING SDN BHD & ANOR

HIGH COURT MALAYA, KUALA LUMPUR
ABDUL AZIZ ABDUL RAHIM J
[ORIGINATING PETITION NO: D8-26-33-2002]
16 NOVEMBER 2009

COMPANY LAW: *Members' rights - Petition under Companies Act 1965, s. 181 - Oppression - Whether conduct of company's Managing Director prejudicial to interests of minority shareholder - Whether Managing Director breached fiduciary duty to company*

COMPANY LAW: *Oppression - Oppression of minority - Whether conduct of company's Managing Director prejudicial to interests of minority shareholder - Companies Act 1965, s. 181*

COMPANY LAW: *Directors - Suit against director - Conduct of company's Managing Director - Breach of fiduciary duty - Oppression - Companies Act 1965, s. 181*

The petitioner/plaintiff was a shareholder holding 49% of the total issues and paid-up capital of the 1st defendant, while the 2nd defendant was the majority shareholder and Managing Director of the same. In filing this petition pursuant to s. 181 of the Companies Act 1965, the plaintiff alleged that the 2nd defendant had breached his fiduciary duties and misused the 1st defendant's assets, confidential information and opportunities in setting up a business dealing in similar food products as that of the 1st defendant, in total disregard of the plaintiff's rights and interests. The plaintiff also averred that the 2nd defendant had repeatedly refused to allow the plaintiff to inspect the accounts and other records of the 1st defendant. It was the plaintiff's further contention that the 2nd defendant proposed to sell shares in two companies, Biz Allianz International (M) Sdn Bhd and Selera Citarasa Sdn Bhd, to one OCB Bhd, which would seriously jeopardise the 1st defendant as its only source of revenue was Biz Allianz International (M) Sdn Bhd. Thus, the plaintiff as a member shareholder of the 1st defendant was directly affected by the 2nd defendant's oppressive conduct.

Held (allowing the petition):

(1) Applying the relevant principles to the facts of this case, the 2nd defendant's conduct in setting up a competing business in the form of a company manufacturing and distributing noodles labelled as "Ibumie" under the auspices of one Ibufood Corporation – in direct competition with the 1st defendant's similar business of "Indomie" – and subsequently engineering the takeover of the entire equity of Ibufood Corporation by OCB Bhd (a strategic preparation by the 2nd defendant to give effect to the proposed sale of shares in Biz Allianz International (M) Sdn Bhd and Selera Citarasa Sdn Bhd to OCB Ltd through the acquisition of Ibufood Corporation), was prejudicial to the interests of the plaintiff and the 1st defendant. Furthermore, the 2nd defendant's refusal to allow the plaintiff to inspect the 1st defendant's accounts and records was a visible departure from the standards of fair play and fair dealings. The 2nd defendant, on the given facts, had breached his fiduciary duty to the 1st defendant – to the plaintiff's detriment as a shareholder in the 1st defendant – when he set up a business to compete with the 1st defendant in marketing and distributing similar food products as that of the 1st defendant *albeit* under a different brand name. It was not disputed that, at all material times, the 2nd defendant was the Managing Director of the 1st defendant and had full control of its affairs. *Elder & Elder v. Watson Ltd* (foll); *Re Kong Thai Sawmill (Miri) Sdn Bhd* (foll); *Re A Company (No. 005134 of 1968), ex p Harris* (foll); *Gidman v. Barron and Others* (foll). (paras 12, 16 & 17)

Case(s) referred to:
Elder v. Elder & Watson Ltd [1952] SC 49 ***(foll)***
Gidman v. Barron and Others [2003] EWHC 153 (Ch) ***(foll)***
Re A Company (No. 005134 of 1968), ex p Harris [1989] BCLC 383 ***(foll)***
Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung [1978] 1 LNS 170 PC ***(foll)***

Legislation referred to:
Companies Act 1965, s. 181

For the petitioner - Fauziah Mustaffa; M/s Abdul Rahman Saad & Assoc
For the respondent - T Sudhar; M/s Shook Lin & Bok

Reported by Suresh Nathan

JUDGMENT

Abdul Aziz Abdul Rahim J:

[1] The plaintiff is a limited company incorporated in Hong Kong and a shareholder of the 1st defendant. The plaintiff belongs to a group of companies controlled by one Dr. Djajadi Djaja to represent his family business in Asia which was subsequently reorganized to what is now known as the Wicaksana Overseas International Group of Companies (hereinafter referred to as "the WOI Group")

[2] The plaintiff holds 49% of the total issues and paid up capital of the 1st defendant. The 2nd defendant held 50% and the remaining 1% was held by Lew Nam Fong. On 22 February 2001, the plaintiff filed a suit to recover among others its beneficial shareholdings held on trust for the plaintiff by the 2nd defendant, Teoh Sik Hwa and Lew Nam Fong. That suit was suit No. D22-111-2001.

[3] WOI Group intended to incorporate companies in Malaysia to carry on the business and to market WOI Groups product in Malaysia. The 2nd defendant at the material time was an employee of the WOI Group in Indonesia. He was employed by the WOI Group and was put in charge of the Malaysian operation. For the purpose of the Malaysian operation, WOI Group incorporated the 1st defendant under the Malaysian Companies Act 1965. Apart from the 1st defendant, WOI Group with the assistance of the 2nd defendant also set-up two other companies in Malaysia to operate closely with each other. These two companies were Biz Allianz International (M) Sdn Bhd and Selera Citarasa Sdn Bhd.

[4] Selesa Citarasa Sdn Bhd undertakes manufacturing and production of the WOI Group products in Malaysia whereas Biz Allianz International (M) Sdn Bhd is the distribution arms of the group's products. The 1st defendant is the registered "Indomie" trademark in Malaysia and Brunei and also doing the marketing and advertising of the product.

[5] The plaintiff alleged that since its incorporation the 1st defendant had invested a sum of RM3 million in its operation but to-date the plaintiff has not received any dividends, interest or any other distributions. It was further alleged that in 1999, the plaintiff

requested permission on several occasions to inspect the accounting and other records of the 1st defendant. However, the 2nd defendant who is also the Managing Director of the 1st defendant always had a reason or an excuse to hinder such inspection. On 16 February 2001, the plaintiff pleaded in his pleading that its nominee directors obtained a court order for Messrs BDO Binder to do such inspection. In its report, which was submitted on or about August 2001, Messrs BDO Binder had shown evidence that the 2nd defendant had actively interfered and hindered the approved auditor from forming an opinion and on the accounting and other records of the 1st defendant. And 2nd defendant also had withheld necessary documents and records of the 1st defendant. The BDO report also raised concern about the irregularity of the 1st defendant's account. Such irregularity were that the 1st defendant's balance sheet has not substantiated the loans by directors and shareholders including 2nd defendant; the high remuneration and bonus paid to the 2nd defendant though the balance sheet shows the 1st defendant is losing money and the high and escalating advertising and promotion costs. The report also states that since its incorporation the 1st defendant has not been paid royalty for the "Indomie" trademark by Biz Allianz International (M) Sdn Bhd which hold "Indomie" exclusive distribution licence. The report also revealed that investigations carried out show that the 2nd defendant had set-up a competing business and aggressively promoting "Ibumie" belonging to the 2nd defendant and has made secret profit at the expense and to the detriment of the 1st defendant.

[6] The 2nd defendant together with the shareholders of Biz Allianz International Sdn Bhd and Selera Citarasa Sdn Bhd were shown to have attempted to sell their majority shareholding in those two companies to one OCB Bhd where the 2nd defendant has interest. It is pertinent to note that this sale were eventually carried out and completed. By selling the shares in these two related companies to OCB Bhd, the 1st defendant will be seriously jeopardized as it is merely the marketing and promoting arm of the WOI Group in Malaysia and therefore will be unable to operate and sustain by itself. The 1st defendant's only source of revenue is Biz Allianz International (M) Sdn Bhd. Therefore, the plaintiff as a member shareholder of the 1st defendant is directly affected by such manipulative and oppressive conduct of the 2nd defendant.

[7] It is a fact that the 2nd defendant as a Managing Director of the 1st defendant has a total control, being a majority shareholder, of the 1st defendant; and therefore is in the position to manipulate the 1st defendant's business and accounts.

[8] Pursuant of the BDO report of August 2001, it is also revealed that Ibumie Sdn Bhd, the competing business company was incorporated on 22 March 2000. The nature of business is manufacturing and trading of food products. The 2nd defendant is a director and shareholder of Ibumie Sdn Bhd. The report also shows that the 2nd defendant is also a director and shareholder of several other companies whose business is manufacturing and trading of food products. These companies are Ibufood Manufacturing (M) Sdn Bhd a company incorporated on 20 September 2000 undertaking the business of manufacturing of noodles and food products; Ibumark (M) Sdn Bhd a company incorporated on 22 March 2000 undertaking the business of manufacturing and trading of food products; Spices and Seasoning Specialities Sdn Bhd undertaking the business of manufacturing of food products eg, spices and seasoning. This company holds the "Ibumie" trademark application No. 99/09313; and Ibufood Corporation Sdn Bhd a company incorporated on 30 March 2000 undertaking the business of factory manufacturing food products.

[9] It was therefore alleged that the 2nd defendant in setting up the structure of companies identical to the WOI Group and the plaintiff to conduct identical if not a similar business of the WOI Group and the plaintiff ie by manufacturing and marketing "Ibumie" has breached fiduciary duties and has misused the assets, confidential information and opportunities of the 1st defendant to set-up a competitive business and make a secret profit therefrom and in total disregard of the plaintiff's rights and interest. In the learned counsel for the 2nd defendant's submission it was submitted that the "Ibumie" is not a business competing with "Indomie" because "Ibumie" is a trademark for soup based noodles whereas "Indomie" is the trademark for a toss dry noodle.

[10] My view is that, the 2 products are very closely similar. The fact that the 2nd defendant is the Managing Director and in control of Biz Allianz International (M) Sdn Bhd which is the distribution arm for "Indomie" would place the 2nd defendant in a position of opportunity to use the networking of WOI Group

to market and distribute "Ibumie". Therefore, there is a very high probability that the 2nd defendant has seized the opportunity to use the information regarding the market for food products particularly noodles belonging to the WOI Group in order to market "Ibumie".

[11] The 2nd defendant has argued that the plaintiff cannot rely on the BDO report because that report was never in evidence. I disagree with this submission because it is a fact that the BDO report was made at the order of the court and it was in fact submitted to the court after its completion. Therefore, the court may refer and rely on the contents of the report.

[12] As to the allegation that the 2nd Defendant together with other shareholders of Biz Allianz International (M) Sdn Bhd and Selera Citarasa Sdn Bhd were disposing their majority shareholding to OCB Sdn Bhd, it was submitted by the learned counsel of the 2nd defendant that the allegation was factually incorrect. It was contended that the proposed sale did not materialize. Instead 50% equity stake of Tan Hoon Cheng @ Dahlan bin Abdullah and Sahbanar bin Asha'ari in Selera Citarasa was acquired by Ibufood Corporation Sdn Bhd and then Ibufood Corporation also acquired the 77.78% equity stake of Yeoh Jin Hoe, Yeoh Jin Aik and Yeoh Jin Beng in Biz-Allianz International (M) Sdn Bhd in 2002. It was further submitted that the offer by Ibufood Corporation to purchase the remaining shares in Selera Citarasa and Biz Allianz International (M) Sdn Bhd held by Chong Ju Han and WOI Pte Ltd were declined. Furthermore, it was submitted that the 2nd defendant who was then holding 1 share in Ibufood Corporation and was its director at the time of its incorporation has resigned and sold his 1 share in Ibufood Corporation on 30 June 2000. Because of these facts, the 2nd defendant says the allegation by the plaintiff was baseless. However, I noted that the 2nd defendant in the affidavit affirmed on 21 March 2006, had alluded to the fact that subsequently OCB Bhd acquired the entire equity stake in Ibufood Corporation. If we were to look carefully at the chronology of events as to how Ibufood had acquired the shares in Biz Allianz and Selera Citarasa Sdn Bhd, we cannot miss the fact that these were done prior to the acquisition by OCB of Ibufood shares. To my mind, the acquisition of Biz Allianz and Selera Citarasa shares by Ibufood is in fact a very strategic preparation by the 2nd defendant through Ibufood to give effect

to the proposed sale of the majority shares in Biz Allianz (M) Sdn Bhd and Selera Citarasa Sdn Bhd to OCB Ltd through the acquisition of Ibufood Corporation.

[13] Section 181 may be invoked where there is 'oppression' of a member or where a member's interest disregarded. It may also be invoked where there is a resolution or act that 'unfairly discriminates' against or is 'otherwise prejudicial' to a member.

[14] A shareholder has a right to expect that the affairs of the company are conducted based on standards of fair dealings and under conditions of fair play. If there is departure from these standards and conditions then the conduct or the act complaint of could be oppressive. There are cases which have applied this principle that is for an allegation of oppressive conduct to be sustained 'at the very least, there must be a visible departure from the standards of fair dealing and a violation of the conditions of fair play on which every member is entitled to rely: *Elder v. Elder & Watson Ltd* [1952] SC 49 and *Re Kong Thai Sawmill (Miri) Sdn Bhd; Kong Thai Sawmill (Miri) Sdn Bhd & Ors v. Ling Beng Sung* [1978] 1 LNS 170 PC.

[15] It has also been held in one case, *Re A Company (No. 005134 of 1968), ex p Harris* [1989] BCLC 383 at pp. 389-390, that the test of unfair prejudice is objective and if the objective bystander observes that the conduct of the respondent was for improper purpose or with improper motive, that may well be a relevant consideration in determining whether the conduct is unfairly prejudicial.

[16] Applying the above principles to the facts of the case, I am of the opinion that the conduct of the 2nd defendant in setting up a competing business in the form of company or companies manufacturing and distributing noodle labelled as 'Ibumie' under the auspices of Ibufood Corporation in direct competition with similar business of 'Indomie' of 1st defendant of which the plaintiff is the shareholder, and later on engineered the takeover of the entire equity of Ibufood Corporation by OCB Bhd is prejudicial to the interest of the plaintiff and the 1st defendant. Furthermore, the refusal or reluctance on the part of the 2nd defendant to allow the plaintiff to inspect the accounts and books and records of the 1st defendant is visible departure from the standards of fair play and fair dealings.

[17] In *Gidman v. Barron and Others* [2003] EWHC 153 (Ch), it was held that there was a clear breach of fiduciary duty on the part of the defendant when the defendant intentionally transferred business and income from the company to a new company established by them. By the same analogy, the 2nd defendant here, on the given facts, has breached his fiduciary duty to the 1st defendant to the detriment of the plaintiff as the shareholder in the 1st defendant when he set up the competing business to compete with the 1st defendant in marketing and distributing similar food products as that of the 1st defendant *albeit* under different brand name. It is not disputed that at all material times the 2nd defendant was the Managing Director of the 1st defendant and had full control of its affairs.

[18] For the above reasons, I allowed the petitioner's amended petition in encl. 35.